No. 75-640

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on June 27, 1975, and a petition for rehearing and suggestion for rehearing *en banc* were denied on September 8, 1975 (Pet. App.

14a-16a). By order of September 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 30, 1975 (Pet. App. 17a), and the petition was filed on that date.

QUESTIONS PRESENTED

1. Whether the government violated petitioner's Sixth Amendment right to counsel by secretly recording incriminatory conversations with a government witness.

2. Whether the district court denied petitioner due process of law by improperly excluding exculpatory testimony of the witness that had been recorded.

3. Whether there was unnecessary preindictment delay in violation of petitioner's Fifth and Sixth Amendment rights.

4. Whether petitioner's acquittal on the substantive counts precluded his conviction of conspiracy.

5. Whether the government suppressed exculpatory evidence.

6. Whether the government's summation and the district court's charge to the jury impermissibly altered the government's theory of the case to petitioner's detriment.

STATEMENT

In February of 1974, petitioner was indicted in a sixteen-count indictment charging him and three others with fraud in the offer and sale of securities

(count 2), fraud in the purchase and sale of securities (counts 3 through 6), mail fraud (counts 7 through 10), and conspiracy to commit these substantive offenses (count 1), in violation of 15 U.S.C. 77q, 77x, 78j(b), 78ff, and 18 U.S.C. 1341, 371 and 2. Counts eleven through sixteen charged Philip Stoller, one of petitioner's three codefendants, who was tried jointly with petitioner, with making false statements, in violation of 18 U.S.C. 1001.[1]

A second three-count indictment, filed on August 1, 1974, charged petitioner and Stoller with obstruction of justice. Upon the government's motion, and without petitioner's objection, the two indictments were consolidated for a jury trial in the United States District Court for the Southern District of New York. During trial, the court granted judgments of acquittal on the three counts of obstruction of justice (Tr. 2171-2177). Petitioner was convicted of the conspiracy charged in the first indictment and acquitted on the remaining substantive counts. He was sentenced to two years' imprisonment and was fined $2,500.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-11a).

The evidence at trial showed that early in 1968, Elmer Moss, President of Training With The Pros, Inc. (TWP), a small sales training business operat-

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[1] A second codefendant pleaded guilty to the conspiracy count and did not stand trial on the remaining counts. The third, a Swiss citizen, remains a fugitive in Switzerland.

[2] Stoller was convicted of conspiracy and eleven substantive offenses.

ing from New York City, asked Raymond N. D'Onofrio for assistance in underwriting a public offering of TWP stock. D'Onofrio agreed and arranged to have Joseph Pfingst, an attorney, represent the company in the underwriting (Tr. 121-127). At a subsequent meeting in Zurich, Switzerland, D'Onofrio, Pfingst, and codefendants Philip Stoller and Jerome Allen devised a scheme to acquire a large number of shares of the initial offering of TWP stock, to inflate the price artificially through a series of "phony sales," and then to sell the shares to two stock accounts controlled by codefendants Stoller and Allen at the Swiss Bank Hofmann (Tr. 140-148, 1244-1246).

In November of 1968, Stoller, Allen and D'Onofrio met with petitioner, a practicing attorney in New York City, who pointed out several errors in their scheme. Petitioner advised them to disguise their large volume purchase by using several friendly nominees initially to acquire the TWP shares and then to buy the stock from the nominees. For his advice, petitioner was promised $15,000 and 1,000 shares of TWP stock (Tr. 168-177).

Pursuant to petitioner's advice, the group's nominees obtained 14,900 shares of the initial stock offering. Shortly thereafter, Stoller, Allen, and D'Onofrio bought the stock from their nominees and deposited it in their Swiss accounts (Tr. 87-88, 194-195, 198-201, 1817-1819, 1839-1842). When the stock reached a value of $45 to $50 per share, the trio sold the stock

to the two Swiss accounts controlled by Stoller and Allen (Tr. 223-228). To complete the sale, Stoller, Allen, and D'Onofrio had to provide the Swiss Bank Hofmann with receipts showing that they had purchased the stock from their respective nominees in whose names the stock remained registered (Tr. 660-690). With petitioner's assistance, the receipts were obtained and delivered to Alfred Herbert, a codefendant employed by the Swiss Bank Hofmann, and the sale was completed (Tr. 256-259, 1071).

Stoller, Allen, and D'Onofrio subsequently promoted TWP stock to New York brokers so that it would further increase in price, thus allowing their two customers to sell at a profit (Tr. 284-286, 1854-1857, 1908-1913, 1927-1935). While the group was promoting the TWP stock, the Securities and Exchange Commission received an anonymous letter which prompted the investigation that uncovered the fraudulent scheme (Tr. 291-292, 1085).

ARGUMENT

1. Petitioner contends (Pet. 14-22) that the government violated his Sixth Amendment right to counsel by secretly recording incriminatory conversations with codefendant Jerome Allen, who had agreed to assist the government with its investigation.

Shortly after the return of the securities fraud indictment, Allen informed a government investigator that petitioner had twice asked him to sign a false affidavit which would refute the charges against petitioner (Tr. 1403-1404). The government there-

upon devised a plan to record conversations between petitioner and Allen, but it specifically instructed Allen to confine his conversations with petitioner to matters involving perjury and obstruction of justice and cautioned him not to discuss the substance of the securities fraud indictment (Tr. 1412, 1427). Allen nevertheless subsequently recorded a conversation with petitioner during which petitioner acknowledged having received $15,000 for his part in the stock scheme and having devised a false explanation for the payment.[3] Since the recorded conversations included evidence of the fraudulent stock scheme as well as the obstruction of justice charges which were subsequently filed against petitioner and joined for trial, the trial court excluded the recordings from evidence to preclude the possibility that the jury would consider the conversation as evidence on the fraud charges (Tr. 2046-2047, 2061, 2074-2076).[4]

In claiming that his Sixth Amendment right to counsel was violated by the recordation of his conversations with Allen, petitioner relies on *Massiah* v. *United States*, 377 U.S. 201. Unlike the situation in *Massiah*, however, the government here did not deliberately elicit from petitioner admissions con-

[3] The tape recording (Government's Exhibit 101) was made available to the defense nearly three months before trial, and the transcript (Government's Exhibit 101B) was given to defense counsel just prior to trial.

[4] The inability of the government to use the tapes led to the judgments of acquittal on the obstruction of justice charges. See Pet. App. 7a-8a, n. 6.

cerning the pending indictment, but merely conducted a permissible investigation of petitioner's post-indictment attempts to commit the separate and distinct offenses of subornation of perjury and obstruction of justice. See *Hoffa* v. *United States*, 385 U.S. 293, 304-310; *United States* v. *Hayles*, 471 F.2d 788, 791-792 (C.A. 5), certiorari denied, 411 U.S. 969; *United States* v. *Osser*, 483 F.2d 727, 730-734 (C.A. 3). In any case, none of the tapes was introduced in evidence.

Petitioner contends that he was prejudiced by the mere existence of the incriminating tapes because their potential use for impeachment purposes deterred him from testifying. This Court has ruled, however, that the unconstitutional acquisition of trustworthy evidence does not preclude its use for the purpose of impeachment. *Oregon* v. *Hass*, 420 U.S. 714; *Harris* v. *New York*, 401 U.S. 222; *Walder* v. *United States*, 347 U.S. 62. As the court of appeals held (Pet. App. 8a): "The *Massiah* context here, at least in the light of the Government's good faith effort not to violate appellant's Sixth Amendment rights, does not differentiate this case."

2. Petitioner next claims (Pet. 23-30) that the trial court denied him due process of law by improperly instructing the jury that it must not consider Jerome Allen's testimony relative to petitioner.

Allen was called as a witness by codefendant Stoller and testified in a manner which contradicted his tape recorded conversation with petitioner (Tr. 2749-2750a, 2870). After cross-examining Allen on the

contradictions, the government showed him a transcript of his recorded conversation; Allen stated that his recollection of the conversation was not refreshed (Tr. 2870-2872). The trial court then excused the jury and cautioned the witness against committing perjury (Tr. 2872).

After consulting with his attorney, Allen claimed his privilege against self-incrimination and refused to answer any questions concerning the conversation (Tr. 2880). The government subsequently moved to admit the tape recording to impeach Allen (Tr. 3075-3077). The trial court ruled that rather than allow the government to use the tape for impeachment, it would instruct the jury that it must not consider any of Allen's testimony relating to petitioner, and did so (Tr. 3098, 3169-3170).

The ruling of the district court was a proper exercise of its discretion. It would have been unfair to the government and a frustration of the search for truth to permit Allen's testimony to be considered by the jury without the benefit of knowing about the contents of the excluded tapes and without the benefit of any cross-examination of Allen after he had invoked his Fifth Amendment privilege. The only alternatives to striking Allen's testimony were to direct the witness to answer the question despite his invocation of the Fifth Amendment, to admit the previously excluded tape recording, or to permit the jury to accept as true Allen's uncontradicted testimony. Each of these options was unfair to someone—either to

Allen, to petitioner or to the government—and each, as the court of appeals noted (Pet. App. 9a), "carried substantial mistrial risks." In these circumstances, the striking of all of Allen's testimony relating to petitioner was proper.

3. Petitioner argues (Pet. 31-40) that his right to a fair trial under the Fifth and Sixth Amendments was prejudiced by the four-year, eight-month delay between the termination of the conspiracy in June of 1969, and his indictment on February 14, 1974.

The Sixth Amendment's guarantee of speedy trial, however, does not apply until a person has been formally accused of a crime either by arrest or by the filing of an indictment or information. *United States* v. *Marion*, 404 U.S. 307, 313-320. Thus, the preindictment delay of which petitioner complains raises no Sixth Amendment speedy trial issue. Nor has petitioner established "substantial prejudice to [his] rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage," both of which must be proven to establish a speedy trial claim under the Fifth Amendment's Due Process Clause. *United States* v. *Marion*, *supra*, 404 U.S. at 324 (emphasis supplied); *United States* v. *Brown*, 511 F.2d 920, 922-923 (C.A. 2).

The only prejudice claimed by petitioner arose from the death of TWP President Elmer Moss who, petitioner alleges, would have contradicted several government witnesses. However, petitioner, although aware of Moss' illness, failed to depose him (*United States* v. *Schwartz*, 464 F.2d 499, 505 (C.A. 2), cer-

tiorari denied, 409 U.S. 1009) or to move for a speedy trial (*United States* v. *Stein*, 456 F.2d 844, 849-850 (C.A. 2), certiorari denied, 408 U.S. 922). Moreover, petitioner makes no allegation of governmental misconduct or bad faith designed to secure a delay for tactical advantage.[5]

4. Petitioner next contends (Pet. 41-45) that his conviction on the conspiracy count is precluded by "fundamental fairness" because of his acquittal on the substantive counts. Petitioner maintains that since two or more persons participated in the activities charged in each substantive count, the conspiracy count was "superfluous" and designed only to secure procedural advantages.

The commission of a substantive offense and a conspiracy to commit the offense are separate and distinct crimes, and a defendant properly may be charged with and convicted of both. See *Iannelli* v. *United States*, 420 U.S. 770, 777-779; *United States* v. *Feola*, 420 U.S. 671, 693-694; *Callanan* v. *United States*, 364 U.S. 587, 593; *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643. Moreover, none of the substantive crimes charged against petitioner required mutual agreement as an essential element; each could be commit-

[5] Petitioner's reliance (Pet. 39) on *Ross* v. *United States*, 349 F.2d 210 (C.A.D.C.), is misplaced; for contrary to petitioner's assertion, that "unique line of cases" in the District of Columbia Circuit is based on the court of appeals' "purported supervisory jurisdiction" and not on the Constitution. *United States* v. *Marion*, *supra*, 404 U.S. at 317, n. 8.

ted by one person alone. Thus, the charge of conspiracy was not "superfluous" but was entirely separate from the substantive offenses. Petitioner's conviction for conspiracy is therefore valid.

5. Petitioner claims (Pet. 46-51) that the government suppressed exculpatory evidence contained in a sentencing memorandum submitted to the trial court at the time of the sentencing of government witness D'Onofrio. However, the court of appeals examined the D'Onofrio sentencing memorandum *in camera* and found "no Jencks act or *Brady* material (*Brady* v. *Maryland*, 373 U.S. 83 (1963)) not already disclosed to [petitioner]" (Pet. App. 10a). There is no reason for this Court to review that finding.[6]

6. Finally, petitioner argues (Pet. 51-52) that the government's summation and the trial court's charge altered, to his prejudice, the government's theory of the substantive offense charged in count two from the fraudulent manipulation of TWP stock to the omission of a material fact (undisclosed underwriters) in the offer and sale of securities.

[6] Petitioner suggests that the government promised D'Onofrio an eighteen-month sentence at Eglin Air Force Base and then suppressed this information from petitioner at trial (Pet. 49). The allegation is groundless. D'Onofrio was told at the conclusion of the petitioner's trial that the government would ask the trial judge to speak to D'Onofrio's sentencing judge. The government did so by letter of October 29, 1974. In any event, since petitioner admits that he knew of this allegation from Melvin Hiller's testimony at trial (Pet. 49), petitioner was not prejudiced by the government's alleged misconduct. See *United States* v. *Stewart*, 513 F.2d 957, 959-960 (C.A. 2).

Petitioner's contention is factually incorrect. Count two of the indictment charged, among other things, the "obtain[ing] of money or property by means of any untrue statement of a material fact or any omission to state a material fact * * *." The government's summation and the trial court's charge properly addressed this offense as alleged in the indictment. In any event, petitioner was acquitted on count two and convicted of a conspiracy having three objectives, only one of which was charged as a substantive offense in count two. Where, as here, the evidence establishes a defendant's agreement to accomplish at least one of a conspiracy's multiple criminal objectives, the conspiracy conviction is valid. *United States* v. *Papadakis*, 510 F.2d 287, 297 (C.A. 2); *United States* v. *Grizaffi*, 471 F.2d 69, 73 (C.A. 7), certiorari denied, 411 U.S. 964.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[7] In addition to the claims discussed herein, petitioner seeks to adopt all of the other arguments made in the court of appeals (Pet. 52). We deem it inappropriate under Rule 23 (1) (c) of the Rules of this Court to respond to these contentions since they are not set forth in the petition.

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